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No. 87-324

In the Supreme Court of the United States

OCTOBER TERM, 1987

ENE SAIPAIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner maintains that he was prejudiced by the trial court's restriction on his cross-examination of a rape victim regarding her prior sexual conduct, even though he was able to introduce the same evidence through the testimony of defense psychiatrists.

1. Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial on one count of rape and on one count of sodomy in violation of Articles 120 and 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 925. Petitioner was sentenced to 20 years' imprisonment, to be dishonorably discharged, to forfeit all pay and allowances, and to a reduction in pay grade.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 10a-14a). On discretionary review, the Court of Military Appeals affirmed (Pet. App. 1a-9a; 24 M.J. 172).

a. On the night of October 16, 1981, Irene Ricks, the wife of a Marine sergeant, was abducted at knifepoint by petitioner as she left the home of a friend (Tr. 237-242). Petitioner forced Ricks into his car and drove her to a beach, where he raped and sodomized her (Tr. 242-251). Ricks did not report the assault until October 26, when she received a threatening phone call from petitioner (Tr. 263).[1] When she reported the assault, Ricks accurately described petitioner and the interior of his car to Naval Investigative Service agents (Tr. 282-288, 291-296). Thereafter, she positively identified petitioner and also made a positive identification of the interior of the car he drove during the sexual assault, which was also traced to petitioner (Tr. 313). Ricks had neither seen nor been acquainted with petitioner prior to the assault.[2]

b. Petitioner's defense at trial was twofold.[3] He argued that Ricks had not been raped at all, and

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[1] The October 26 telephone call was one of a series of such calls that petitioner made to Ricks (Tr. 262, 263, 267, 268).

[2] Although Ricks was the only eyewitness to the crime, other evidence corroborated her trial testimony. Judy Colburn, petitioner's former girlfriend, and Sergeant Edward Culver corroborated Ricks' testimony that petitioner wore a bolt earring in his left ear (Tr. 252-253, 258, 364, 370, 374). Sergeant Culver corroborated Ricks' testimony that petitioner had a small pair of baby shoes hanging from his rear view mirror (Tr. 367-368). Sergeant Culver and Corporal Spires also corroborated Ricks' testimony that petitioner's car had torn interior upholstery (Tr. 257, 313-314, 367).

[3] Petitioner did not testify at trial (Pet. App. 7a).

that, even if she was raped, he was not her assailant (Tr. 232 (defense opening argument); Tr. 603-616 (defense closing argument)). To support the first defense, petitioner maintained that Ricks was "preoccupied with sexual activity and manipulation of men and that this contributed to psychotic disorders, manifested by a false sexual accusation against [petitioner]," who was a stranger to her (Pet. App. 7a). Before trial, petitioner moved to introduce evidence of Ricks' sexual history in order to support the defense that she was not raped (Tr. 74-75). Petitioner argued that Ricks' "borderline psychosis, with its underlying basis in her sexual history, constitutes a bias, prejudice and motive to misrepresent[,] which may be impeached either by examination of [Ricks] or by evidence otherwise adduced" (AX 8, at 1). Petitioner sought to prove that Ricks' "sexually based borderline psychosis and hysterical personality condidition" led her falsely to claim that she had been raped (*ibid.*; Tr. 74-75).

The trial judge granted the defense motion in part and denied it in part (Tr. 76-77, 438-439, 494-496). The court ruled that petitioner would not be allowed to ask Ricks about her prior involvement in prostitution, the number of men with whom she had had sexual relations, and the amount of money that she had received as a prostitute. At the same time, the court permitted the defense to offer psychiatric testimony concerning her psychological makeup and its tendency to produce false sexual accusations. The court also held that the defense psychiatrists would be permitted to discuss Ricks' sexual history insofar as it related to their diagnosis (Pet. App. 3a). Accordingly, the judge allowed the defense psychiatrists to explain how their diagnoses were based in part on

Ricks' past involvement in prostitution (*ibid.*; Tr. 76-77, 438-439, 460-482).

c. The Navy-Marine Corps Court of Military Review affirmed (Pet. App. 10a-14a). The court found that, given petitioner's defense, the trial judge properly limited defense cross-examination of Ricks about her prior sexual conduct (*id.* at 11a-12a). Cross-examination of Ricks' sexual history, the court explained, "would have neither proved nor disproved the events" of the night in question (*id.* at 12a). The Court of Military Appeals also affirmed (*id.* at 1a-9a). The court found that, given petitioner's defenses, Ricks' sexual history was "too remote" to justify its admission (*id.* at 8a), and that, in light of the extensive psychiatric testimony regarding Ricks' lifestyle and mental state, the trial judge's ruling did not prejudice the defense (*ibid.*).

2. Petitioner maintains that the trial judge erred when he prohibited petitioner from cross-examining Ricks about her sexual history in order to show that she was biased against men and may have fabricated the assault charges. That fact-bound claim does not warrant review by this Court. The trial judge, applying Mil. R. Evid. 412, properly balanced the probative value of the evidence at issue against the danger of unfair prejudice (see Mil. R. Evid. 412(c)(3)), and concluded that the evidence would not be admitted on cross-examination, but could be explored in the course of the psychiatrists' testimony about Ricks' mental state. That judgment constituted a permissible balancing of the probative value of the evidence against its potential for prejudice; when such a balance is struck, there is no violation of the Confrontation Clause simply because the defendant is not able to conduct as thorough a cross-examination

as he would like. See, *e.g.*, *Doe* v. *United States*, 666 F.2d 43, 46-48 (4th Cir. 1981); *United States* v. *Kasto*, 584 F.2d 268, 271-272 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979).

Even if the trial judge's evidentiary ruling was erroneous, petitioner was not prejudiced by the error, since the two defense psychiatrists revealed all the information necessary to present petitioner's defense that Ricks' claim of rape was fabricated. See *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986).[4]

The court-martial panel was fully aware of the facts underlying petitioner's claim of "bias." The trial judge allowed the defense psychiatrists to address the same areas of inquiry about which petitioner sought to question Ricks, including her history of prostitution, to explain the basis for their diagnoses.[5] The testimony of the defense psychiatrists

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[4] The trial court otherwise did not restrict defense cross-examination of Ricks (see Tr. 271-298). Defense counsel sought to show that Ricks could not accurately identify petitioner as her assailant or the car that her assailant was driving, because the area where she was taken was dark and because she had a shirt over her face when she was assaulted (Tr. 281-285). Ricks also admitted on cross-examination that she had been raped by her uncle when she was a child and that she had been a patient of two different psychiatrists (Tr. 271, 274). Both psychiatrists were later called as defense witnesses.

[5] Defense psychiatrist Dr. Kent Jordan testified that Ricks had been promiscuous (Tr. 470). He explained that Ricks had begun working as a prostitute at age nine and that she received a great deal of money "without regard for the welfare of the people she got the money from. And she somewhat delighted, and took pleasure out of humuliating men, hurting men, debasing men, and ruining them" (Tr. 463; see also Tr. 463-464, 474, 475). Dr. Jordan testified that Ricks was manipulative and "[l]ied very well and easily and showed no

also enabled petitioner to develop fully the defense theory that Ricks' claim that she had been raped was a fabrication stemming from her alleged personality disorders.[6] By the time their testimony was completed, the court-martial panel was fully aware of Ricks' past and the defense theory that her claim of rape was a product of her imagination.[7] The ques-

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remorse, no compassion for other people that she hurt" (Tr. 463; see also Tr. 467-468, 480). According to Dr. Jordan, Ricks received approximately $50,000 from a man who was one of his patients (Tr. 464). Ricks also feared retaliation from these men, according to Dr. Jordan (Tr. 462, 465-466). Dr. Krishna Kumar testified that Ricks "was afraid of her sexual impulses" and that, if her husband was not with her, "she may be attracted to other men" (Tr. 499, 501). Dr. Kumar also testified that Ricks had told him that her first husband had died in an automobile accident, although at trial Ricks denied that that was true (Tr. 298).

[6] For example, Dr. Jordan testified that he saw Ricks on 24 occasions between March and May of 1980 (Tr. 462). He described Ricks as having three personality disorders: (1) a sociopathic personality disorder, which he defined as "a person that has very little or no conscience" and "a tendency to manipulate other people to obtain one's own advantage at the expense of other people" (*ibid.*); (2) a histrionic personality disorder, which he described as a tendency "to exaggerate, distort reality to some extent but not grossly" and to be "seductive" (*ibid.*); and (3) a borderline psychosis, which he defined as "intermittent[] decompensat[ion] into a state of being out of contact with reality, with stress" (Tr. 463; see also Tr. 468-469). Defense psychiatrist Dr. Kumar, who saw Ricks on three occasions, also testified that Ricks "exhibited severe anxiety and restlessness," that she was manipulative, that some of her statements could have been a manifestation of a "dissociative reaction," and that she could be classified as suffering from a "hysterical neurosis" (Tr. 500, 501, 504, 505, 512, 515).

[7] The trial judge instructed the panel that it could consider the evidence that Ricks "may have engaged in sexual inter-

tion before the panel was whether to believe the inferences petitioner sought to draw from the defense psychiatrists' testimony, or Ricks and the government's rebuttal psychiatric expert.[8] The trial court's restrictions on the cross-examination of Ricks were immaterial to that question.

This case is therefore distinguishable from *Davis* v. *Alaska*, 415 U.S. 308 (1974), on which petitioner relies. In that case, the defendant was prohibited from eliciting on cross-examination that the prosecution's chief witness was on juvenile probation at the time of his pretrial identification of the defendant and at trial. The defense sought to impeach the witness with that fact in order to suggest that the witness may have slanted his testimony in the prosecution's favor either to shift suspicion away from himself or to avoid a revocation of his probation for failing to "cooperate" with the authorities. In reversing the conviction, the Court emphasized that Davis was

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course in the past in return for gifts, money or other material gain * * * solely in regard to the matter of the mental status and mental condition of Mrs. Ricks and on the issue of the weight and value to be given to the professional or expert opinion of Doctor Jordan and Doctor Kumar" (Tr. 625).

[8] The government called Dr. Gregory Melieste in rebuttal. He saw Ricks ten days after the assault and testified that Ricks felt that "men were to be distrusted but at the same time that she felt that she could in fact control them" (Tr. 528, 531). Dr. Melieste's diagnostic impression of Ricks was that she had low self-esteem and an unspecified personality disorder, perhaps with hysterical or narcissistic features (Tr. 533-534). He found no indication that Ricks was out of touch with reality or suffering from a delusion (Tr. 535). Two days later, Ricks telephoned Dr. Melieste and told him that she had been raped, which he testified would have affected his impression of her during their first meeting (Tr. 536-537, 545).

completely foreclosed from pursuing this line of inquiry, that the witness's testimony was "crucial," and that there was a "real possibility" that pursuit of the excluded line of impeachment would have done "[s]erious damage" to the prosecution's case. *Id.* at 319; *Van Arsdall*, 475 U.S. at 683.

By contrast, petitioner's claim is not that Ricks was "biased" in the traditional sense of that term, but that her claim of rape was the product of mental disorder. That claim, as petitioner recognized in his pretrial motion (AX 8, at 1; see also Tr. 74), could be supported either by cross-examination of Ricks or through other evidence. Accordingly, even if Ricks' credibility was crucial, questioning Ricks about her past was not the only means of advancing the defense theory that her claim was fictitious. The restriction on the cross-examination of Ricks therefore did not prejudice petitioner in his ability to present his defense to the finder of fact.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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